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No. 08-322

In The Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* SUPPORTING APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

The Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars and the public to improve understanding of the Constitution and to preserve the rights, freedoms, and structural safeguards that it guarantees. CAC accordingly has a strong interest in this case and in the scope of Congress's enforcement powers under the Reconstruction Amendments.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

For the reasons stated by the Federal Appellee, Intervenor-Appellees, and the District Court, Congress's extension of the Voting Rights Act preclearance provision is well within its constitutional powers.

The Appellees have shown in their briefs that the Act's preclearance provision is constitutional under *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) and *City of Rome v. United States*, 446 U.S. 156 (1980), as well as *City of Boerne v. Flores*, 521 U.S.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel, made a monetary contribution intended to fund the brief's preparation or submission. The written consent of the Solicitor General accompanies this brief. The remaining parties have consented to the filing of this brief by filing blanket letters of consent.

507 (1997), and its progeny. *See, e.g.*, Br. for the Federal Appellee, at 16-30; Br. for Intervenor-Appellees Texas State Conference of NAACP Branches, et al., at 22-32. As the United States has demonstrated, "both lines of cases agree that where, as here, Congress seeks to enforce a right that is at the core of the protection afforded by the Reconstruction Amendments, this Court's review of the appropriateness of Congress's chosen method of protection is highly deferential." Br. for the Federal Appellee, at 8.

The history and text of the Reconstruction Amendments strongly support the conclusion that Congress acted well within its constitutional authority in enacting the Voting Rights Act extension. A broad range of scholars has recently enriched our knowledge of the text and history of the Fourteenth Amendment's enforcement clause.[2] The history of the Fourteenth Amendment's enforcement clause is particularly important in understanding Congress's

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[2] *E.g.*, Michael Stokes Paulsen, *A Government of Adequate Powers*, 31 Harv. J.L. & Pub. Pol'y 991 (2008); Akhil Reed Amar, *America's Constitution: A Biography* (2005); Robert J. Kaczorowski, *The Supreme Court and Congress's Power to Enforce Constitutional Rights: An Overlooked Moral Anomaly*, 73 Fordham L. Rev. 153 (2004); John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (2002); Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 Stan. L. Rev. 1127 (2001); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26 (2000); Steven A. Engel, Note, *The* McCulloch *Theory of the Fourteenth Amendment:* City of Boerne v. Flores *and the Original Understanding of Section 5*, 109 Yale L.J. 115 (1999); Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999); Michael W. McConnell, *Institutions and Interpretation*, 111 Harv. L. Rev. 153 (1997).

power to enforce the guarantees of the Reconstruction Amendments, as it produced the most extended debate and discussion. *Amicus* CAC thus focuses extensively in this brief on the history of the adoption of the Fourteenth Amendment.

The Congress that considered and adopted the Fourteenth Amendment viewed broad congressional authority as an indispensable lynchpin of the Amendment. The language that the Framers used to define the scope of Congress's authority—"appropriate legislation"—reflected this decision to ensure that Congress would have an ample berth for legislative choices. The drafting history in Congress, ratification debates in State legislatures, and contemporaneous legislative interpretations of Section 5 all reflect an understanding of extensive congressional power and discretion to enforce the Amendment.

The available evidence about the scope of the Fourteenth Amendment's enforcement clause thus points overwhelmingly to the conclusion that Congress has broad authority and discretion under Section 5 of the Fourteenth Amendment and the nearly identical enforcement provision of the Fifteenth Amendment. *See* Br. for the Federal Appellee, at 16 (arguing that the enforcement clauses of the Fourteenth and Fifteenth Amendments were deliberately intended to confer "broad new legislative powers"). Whatever the outer boundaries of this far-reaching power, the Voting Rights Act extension fits comfortably within the Reconstruction Framers' conception that Congress would exercise its experience and expertise to fashion legislative

solutions in furtherance of the Reconstruction Amendments' paramount protections.

ARGUMENT

I. THE TEXT AND HISTORY OF THE FOURTEENTH AMENDMENT'S ENFORCEMENT CLAUSE WERE FORGED IN THE CRUCIBLE OF RECONSTRUCTION

Before turning to the history of the Fourteenth Amendment's adoption, it is important to recognize that the Fourteenth Amendment's enforcement clause was shaped by the country's experience after the Thirteenth Amendment, and that the Fourteenth Amendment, in turn, helped to shape the enforcement power granted under the Fifteenth Amendment.

The Thirteenth Amendment was born out of the Civil War to end the current crisis of slavery and prevent future calamities. Addressing a crowd that gathered around the White House on February 1, 1865, President Abraham Lincoln called the Thirteenth Amendment, sent that day for ratification by the States, a "king's cure" for the evils of slavery that paved the way for "the reunion of all the states perfected and so effected as to remove all causes of disturbance in the future." 8 *The Collected Works of Abraham Lincoln* 254-55 (Roy P. Basler ed., 1953). The Thirteenth Amendment—passed by Congress at Lincoln's urging, ratified by several of the States in his memory—represented a dramatic constitutional departure. While the first eleven amendments to the Constitution all sought to *limit* the power of the federal government, the enforcement clause of the Thirteenth Amendment *added* to federal power in

expansive language, beginning a new constitutional tradition of expanding congressional power to enforce constitutional guarantees. *See* Akhil Reed Amar, *America's Constitution: A Biography* 360-361 (2005).

While achieving President Lincoln's quest to root slavery out of our founding document, the Thirteenth Amendment quickly proved insufficient to secure fully for the nation the "new birth of freedom" Lincoln promised at Gettysburg. 7 *The Collected Works of Abraham Lincoln* 23 (Roy P. Basler ed., 1953). As members of Congress moved to address these problems with the passage of the Civil Rights Act of 1866, they were met by opposition in Congress and a veto by President Johnson on the ground that the Act exceeded Congress's power to enforce the Thirteenth Amendment. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-77* 250 (1988).

The 39th Congress demonstrated its broad understanding of the enforcement power conferred by the Thirteenth Amendment by passing the 1866 Civil Rights Act over President Johnson's veto—the first time in U.S. history a major piece of legislation was passed over a presidential veto[3]—but this fight crystallized the need for more constitutional change. The Fourteenth Amendment was approved by Congress two months after passage of the 1866 Civil Rights Act to secure both liberty and equality against hostile acts of State and local governments; this new grant of power ended any doubt about the constitutionality of the 1866 Civil Rights Act.

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[3] *See* U.S. Congress, *Presidential Vetoes, 1789-1988*, S. Pub. 102-12, 103rd Cong., 2d Sess., at 1-30 (1992).

Echoing the Thirteenth Amendment's provision that "Congress shall have power to enforce this article by appropriate legislation," U.S. Const. amend. XIII, § 2, the Fourteenth Amendment also gave Congress broad authority to enforce, by "appropriate legislation," the Constitution's new protections for civil and human rights. U.S. Const. amend. XIV, § 5. *See generally* Amar, *America's Constitution*, at 363 (explaining that the people ratified the Thirteenth and Fourteenth Amendments "[k]nowing full well that Congress believed that this language authorized transformative new federal statutes to uproot all vestiges of unfreedom and inequality").

The Fifteenth Amendment, passed by the 40th Congress in early 1869 and ratified in early 1870, completed the Constitution's Second Founding that followed the Civil War. With the Fourteenth Amendment having broadly secured civil rights and liberties, the Fifteenth Amendment declared that citizens of the United States have a right to vote that cannot be "denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. Like the Thirteenth and Fourteenth Amendments, the Fifteenth Amendment sweepingly declares in its second section that "Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2.

While the three Reconstruction Amendments contain nearly identical enforcement clauses, it is in the debates over the Civil Rights Act of 1866 and the Fourteenth Amendment's enforcement power where our Reconstruction Framers made their intentions absolutely clear. Answering the challenges to federal authority raised by opponents of the 1866 Act, the

Framers of the Fourteenth Amendment stated in no uncertain terms that they were granting Congress the sweeping authority of Article I powers as interpreted by *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). *See* Br. for the Federal Appellee, at 17. Accordingly, the text and history of the Fourteenth Amendment inform the meaning of the Fifteenth Amendment's grant of congressional power to enforce the right to vote, as well as the Fourteenth Amendment itself.[4]

II. THE FOURTEENTH AMENDMENT GRANTED CONGRESS BROAD DISCRETION TO CHOOSE APPROPRIATE MEANS FOR PROTECTING CONSTITUTIONAL RIGHTS

The Fourteenth Amendment unmistakably committed the nation to the protection of individual rights, including the right to be free of racial discrimination. As Section 1 proclaims, "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor

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[4] As the United States' brief shows, the Court has given *McCulloch*-style deference to enforcement legislation under all three Reconstruction Amendments with respect to measures directed against racial discrimination. Br. for the Federal Appellee, at 19 (citing, *inter alia*, *Tennessee v. Lane*, 541 U.S. 509, 561 (2004) (Scalia, J., dissenting)). At the very least, as explained by Intervenor-Appellees, the renewal of the VRA's preclearance provisions is clearly constitutional in light of the specific office and mission of the Fifteenth Amendment. *See* Br. for Intervenor-Appellees Texas State Conference of NAACP Branches, et al., at 22-32.

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The fifth section of the Amendment announced that Congress would share with the courts the responsibility for giving effect to these fundamental constitutional commitments: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. The congressional debates over the Fourteenth Amendment, the text the Framers chose, the Amendment's drafting history, the ratification debates, and early post-ratification interpretations of the text, all confirm that Section 5 was intended and understood to give Congress wide latitude to select the measures it considered appropriate for the protection of constitutional rights. *See also* Br. for the Federal Appellee, at 16-20.

A. The Framers of the Fourteenth Amendment Sought To Confer Broad Legislative Discretion on Congress To Enforce the Amendment

As the Fourteenth Amendment was debated in Congress, southern States were devising strategies to restrict the freedoms of newly freed slaves and enacting new "Black Codes," aimed at making African Americans second-class citizens. *See* Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. at 64-65. The protections of the Fourteenth Amendment, such as the Equal Protection Clause, provided part of the constitutional response to these renewed threats to racial equality. The Framers of the Fourteenth Amendment, however, were understandably reluctant to leave the judiciary with the sole responsibility for protecting against racial

discrimination and other violations of constitutional rights. In the aftermath of the Supreme Court's decision in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), the Framers of the Fourteenth Amendment were determined to give Congress a concurrent power to enforce the constitutional guarantees of liberty and equality.

Against this backdrop, it is no surprise that the congressional debates on the Fourteenth Amendment stressed the importance of a broad federal *legislative* power to protect constitutional rights. The leading proponents of the Amendment, Senator Jacob Howard and Representative John Bingham, delivered important speeches explaining that Congress would have wide latitude to enact "appropriate" measures for protecting constitutional rights.

Introducing the proposed Amendment to the Senate in May 1866, Senator Howard devoted a significant portion of his remarks to Congress's enforcement power under Section 5. *See* Cong. Globe, 39th Cong., 1st Sess. 2764-66 (1866). Howard emphasized the importance of Congress's power to enforce the Amendment. The antebellum Constitution, Howard noted, did not give Congress authority to protect constitutional rights against state infringement. *Id.* at 2765. Though the Bill of Rights was understood to protect individual liberties against federal invasion, these liberties did not fall within "the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers." *Id.* at 2766. Accordingly, Congress lacked authority to give "full effect" to individual liberties,

"while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year." *Id.*

The enforcement clause in Section 5 of the proposed Fourteenth Amendment, Howard declared, would remedy this flaw in the Constitution. "The great object of the first section of this amendment is . . . to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Without congressional action, however, Section 1's restraints would be ineffectual. It was necessary, if these restraints were "to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end." *Id.* The fifth section of the Amendment gave the legislature precisely this power. "Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution." *Id.*

Senator Howard's speech refutes a narrow reading of Congress's power to enforce the Fourteenth Amendment. The enforcement provision, Howard said, conferred "authority to pass laws which are appropriate to the *attainment of the great object* of the amendment." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (emphasis added). Section 5 "casts upon Congress the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith, and that no State infringes the rights of persons or property." *Id.* at 2768. For Senator Howard, the enforcement provision was "indispensable" because it "imposes

upon Congress this power and this duty. It enables Congress, in case the States shall enact laws in conflict with the principles of the amendment, to correct that legislation by a formal congressional enactment." *Id.*

The House debates confirmed the breadth and significance of the congressional power to enforce the Fourteenth Amendment's substantive guarantees. Like Senator Howard, Representative Bingham emphasized that Section 5 would bring a fundamental change in the balance of power between the federal government and the States. Cong. Globe, 39th Cong., 1st Sess. 2542 (1866). Immediately after reading the full text of the proposed Amendment to the House, Bingham called attention to the enforcement power. *Id.* "There was a want hitherto," Bingham noted, "and there remains a want now, in the Constitution of our country, which the proposed amendment will supply." *Id.* Before the Fourteenth Amendment, the Constitution failed to recognize "the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do": to enact legislation for the purpose of safeguarding constitutional rights. *Id.*

The statements of several other supporters confirmed that Congress's enforcement power was a vital component of the Fourteenth Amendment. Representative Broomall expressed the point forcefully: "We propose . . . to give power to the Government of the United States to protect its own citizens within the States, within its own jurisdiction. Who will deny the necessity of this? No one." Cong.

Globe, 39th Cong., 1st Sess. 2498 (1866). Representative Miller similarly highlighted, in emphatic terms, that the enforcement power was essential to any constitutional provision that purported to protect rights: "The fifth section gives to Congress the power to enforce the provisions of this article by appropriate legislation. This of course is requisite to enforce the foregoing sections, or such of them as may be adopted, and is too plain to admit of argument; and in fact is not, as I am aware, contested by any gentleman in this House." *Id.* at 2510-11. Congressman Jehu Baker likewise explained that the fifth section of the Amendment was "necessary in order to carry the proposed article into practical effect." *Id.* at App. 257.

The Fourteenth Amendment's opponents also understood Section 5 to confer a broad discretion on Congress to enforce the Amendment's provisions—and, in fact, this broad power was one of the reasons for their opposition to the Amendment. *See* Cong. Globe, 39th Cong., 1st Sess. 2500 (1866) (Rep. Shanklin) (arguing that that the Fourteenth Amendment would "strike down . . . State rights and invest all power in the General Government"); *id. at* 2538 (Rep. Rogers) (objecting that the Fourteenth Amendment would "consolidate[] everything in one imperial despotism"); *id.* at 2940 (Sen. Hendricks) (calling the enforcement clause "most dangerous"). Accordingly, while supporters and opponents of the Fourteenth Amendment parted ways on the merit of the Amendment's broad enforcement power, both sides agreed that the Amendment would provide Congress significant authority to enforce its provisions.

B. The Text of the Fourteenth Amendment Was Intended and Understood To Give Congress Broad Discretion To Enact Appropriate Enforcement Legislation

The Framers of the Amendment chose language that was calculated to give Congress wide latitude to enact legislation for the purpose of securing constitutional rights. As several scholars of the Fourteenth Amendment's history have explained, the phrase "by appropriate legislation" had a specific meaning in 1866—a meaning that gave effect to the expressed wishes of the Amendment's supporters to assign Congress a powerful role to protect against unconstitutional actions. *See, e.g.*, Amar, *Intratextualism*, 112 Harv. L. Rev. at 822-27; McConnell, *Institutions and Interpretation*, 111 Harv. L. Rev. at 178 n.153; Engel, *The* McCulloch *Theory*, 109 Yale L.J. at 131-34.

Had the drafters of the Fourteenth Amendment wanted to grant Congress a more narrowly constrained power to enforce the provision's substantive guarantees, they could have inserted restrictive language into Section 5, or could simply have given Congress the power "to enforce the provisions of this article." Instead, the Framers chose to include in the enforcement provision these words: "by appropriate legislation." This phrase, separated by commas from the rest of the section, might seem at first glance to be superfluous. How else, one might ask, is Congress to enforce the Fourteenth Amendment's commitments to equality and liberty, if not "by appropriate legislation"?

The phrase, however, was not superfluous. To those who drafted, debated, proposed, and ratified

the Fourteenth Amendment, the term "by appropriate legislation" called to mind an expansive vision of federal legislative authority. *See* Engel, *The* McCulloch *Theory*, 109 Yale L.J. at 133-43; *see also* Br. for the Federal Appellee, at 17-18. Under the Supreme Court's classic elucidation of congressional power under Article I, which was well known at the time the Fourteenth Amendment was considered and adopted, Congress was understood to have wide discretion to choose whatever legislative measures it considered "appropriate" for achieving the purposes the Constitution assigned to it. *McCulloch*, 17 U.S. (4 Wheat.) 316, 401-23 (1819). In *McCulloch*, Chief Justice Marshall had laid down the fundamental principle determining the scope of Congress's powers under the Necessary and Proper Clause: "Let the end be legitimate, let it be within the scope of the constitution, and *all means which are appropriate*, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 421 (emphasis added).

This broad construction of congressional power entailed a deferential role for judicial scrutiny when Congress acted pursuant to an affirmative grant of power. *McCulloch* squarely rejected the substitution of judicial judgment regarding the measures needed to fulfill Congress's duties. For the courts to review the necessity of Congress's chosen measures would be to violate the separation of powers between the Courts and Congress, "to pass the line which circumscribes the judicial department, and to tread on legislative ground." *Id.* at 423. Chief Justice Marshall used the word "appropriate" to describe the

scope of congressional power no fewer than six times. *Id*. at 408, 410, 415, 421, 422, 423. [5]

The Framers of the Fourteenth Amendment were also acutely aware that the pre-Civil War Supreme Court had given a broad construction to Congress's power to enforce what the Court viewed as a constitutional "right" to the return of slaves, as recognized by the Fugitive Slave Clause—one of the few provisions of the antebellum Constitution that limited state action. *See* Kaczorowski, 73 Fordham L. Rev. at 221-30. In *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842), the Court upheld the Fugitive Slave Act of 1793. The Act's extensive scheme of civil remedies against private parties who interfered with

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[5] The influential treatise-writers of the age followed *McCulloch*'s understanding of the breadth of congressional freedom to choose "appropriate" measures. The accounts of congressional power authored by Justice Story and Chancellor Kent, for example, were cited repeatedly during the debates over the Reconstruction Amendments. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (statement of Rep. Bingham) (quoting Story); *id.* at 1118 (statement of Rep. Wilson) (quoting Kent); *id.* at 1292 (statement of Rep. Bingham) (quoting Kent); *id.* at 1294 (statement of Rep. Shellabarger) (quoting Story). Story used the word "appropriate" to emphasize that Congress "must have wide discretion as to the choice of means." 1 Joseph Story, *Commentaries on the Constitution of the United States* 417 (1833) ("[T]he only limitation upon the discretion would seem to be, that the means are *appropriate* to the end. And this must naturally admit of considerable latitude; for the relation between the action and the end . . . is not always so direct and palpable, as to strike the eye of every observer.") (emphasis added). Chancellor Kent likewise invoked *McCulloch* when stressing the importance of Congress's power to adopt any means "which might be *appropriate* and conducive" to a permissible end. 1 James Kent, *Commentaries on American Law* 238 (1826) (emphasis added).

slaveholders' attempts to recapture their "property" was, the Court held, justified as "appropriate" legislation to enforce the entitlements of slaveholders under the Fugitive Slave Clause. *See* U.S. Const. art. IV, § 2, cl. 3. Justice Story expressed this conclusion using language that the Fourteenth Amendment's drafters would later adopt: "the natural inference" from the existence of the right of recapture was that Congress was "clothed with the *appropriate* authority and functions to *enforce* it." *Prigg*, 41 U.S. at 615 (emphasis added). The Court relied on *McCulloch* as authority for the implied enforcement power: "The end being required, it has been deemed a just and necessary implication, that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end." *Id.* at 619; *see also Ableman v. Booth*, 62 U.S. (21 How.) 506, 517, 526 (1859) (stating that Congress had power to "protect and guard the rights of all by appropriate laws" and upholding the Fugitive Slave Act of 1850). Under *Prigg*, Congress had the same broad discretion to choose "appropriate" means for enforcing rights as it did when it acted to "carry into execution" its Article I powers, even where the Constitution provided no explicit textual authority for an enforcement power.

Those who drafted and supported the Fourteenth Amendment, though they abhorred the "right" the Court upheld in *Prigg*, made sure to incorporate the *Prigg* Court's understanding of congressional power, and enlisted it in the support of the causes of liberty and equality. Reconstruction legislators first acted on this understanding of Congress's enforcement power when they approved the Thirteenth Amendment. The first section, of course, decreed the abolition of

slavery, while the second added, in language borrowed from *Prigg* (as well as *McCulloch*), that "Congress shall have the power to enforce this article by appropriate legislation." U.S. Const. amend. XIII, § 2.

At the same time legislators discussed the power to enforce the Fourteenth Amendment, they displayed their understanding of the power to enforce a constitutional provision "by appropriate legislation" when enacting the Civil Rights Act of 1866. *See* Br. for the Federal Appellee, at 17-18. The Act, which applied to northern and southern States alike, recognized as citizens all persons born in the United States, and prohibited both state officials and private persons from depriving anyone, on the basis of race, of the rights to make and enforce contracts, sue in court, give evidence, and own real and personal property. These protections extended far beyond the self-executing provisions of the Thirteenth Amendment; in today's terms, they were "prophylactic" enforcement measures. *See, e.g.*, *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439-40 (1968) ("[T]he majority leaders in Congress—who were, after all, the authors of the Thirteenth Amendment—had no doubt that its Enabling Clause contemplated the sort of positive legislation that was embodied in the 1866 Civil Rights Act."); Amar, *Intratextualism*, 112 Harv. L. Rev. at 823 (the 1866 Act, which "swept far beyond merely prohibiting slavery and involuntary servitude," illustrates the 39th Congress's "broad view" of the enforcement power).

The legislators, who would shortly approve the Fourteenth Amendment's near-identical enforcement clause, pointed to *McCulloch* and *Prigg*'s expansive

construction of congressional power as the proper framework for assessing whether the 1866 Act qualified as "appropriate legislation." Republicans drew on "the celebrated case of *McCulloch vs. the State of Maryland*" to explain why Congress had power to enact the 1866 Act. Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson).[6] Under *McCulloch*, Representative Wilson noted, Congress was the "sole judge" of the necessity of a measure that was indisputably directed at a legitimate end. *Id.* Wilson's speech pointedly explained that *Prigg*'s broad understanding of the congressional enforcement power, previously a weapon against liberty, could now be applied in freedom's service: "We will turn the artillery of slavery upon itself." *Id.* Representative Wilson further elaborated, "And now, sir, we are not without light as to the power of Congress in relation to the protection of these rights. In the case of *Prigg vs. Commonwealth of Pennsylvania*—and this it will be remembered was uttered in behalf of slavery—I find this doctrine, and it is perfectly applicable to this case." Cong. Globe, 39th Cong., 1st Sess. 1294 (1866).

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[6] One reason the Fourteenth Amendment was adopted was to put beyond doubt the constitutionality of the Civil Rights Act of 1866. Though Representative Bingham doubted whether the Thirteenth Amendment provided a sufficient basis for the 1866 Act, Representative Eliot's view is typical of Republican opinion—that the Fourteenth Amendment was not necessary to support the Act: "I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question." Cong. Globe, 39th Cong., 1st Sess. 2513 (1866) (statement of Rep. Eliot).

Representative Wilson punctuated his point by reading from Justice Story's opinion in *Prigg*, which, in turn, invoked Chief Justice Marshall's opinion in *McCulloch*. *Id.*

The debate proceeded along these lines, continually re-emphasizing the need for broad congressional powers. Representative Shellabarger stated that the relevant question was whether the Act's provisions fell within "the rule laid down by the Supreme Court in innumerable cases, that in order to entitle this Government to assume a power as an implied power of this Government it 'must appear that it is appropriate and plainly adapted to the end.'" Cong. Globe, 39th Cong., 1st Sess. 1294 (1866) (quoting Story, *supra* note 5, at 416). Senator Trumbull similarly viewed the enforcement clause as a grant of power "to secure freedom to all people in the United States," stating that the clause "vests Congress with the discretion of selecting that 'appropriate' legislation, which it is believed will best accomplish the end." *Id.* at 475; *see also id.* at 43 (1865) (Section 2 of the Thirteenth Amendment "was inserted expressly for the purpose of conferring upon Congress authority by appropriate legislation to carry the first section into effect. . . . What that 'appropriate legislation' is, is for Congress to determine, and nobody else."); *id.* at 1124 (1866) (statement of Rep. Cook) ("Congress should be the judge of what is necessary" for securing the rights of freemen to former slaves).

This understanding of the text's contemporary meaning sheds additional light on the intentions of the Fourteenth Amendment's congressional proponents. Given the widely shared meaning of the

words the Framers chose, it is clear that they intended to confer broad discretionary powers—including the power to enact prophylactic measures. As Senator Howard emphasized, Section 5 is "a direct affirmative delegation of power to Congress to carry out all the principles" of Section 1; the Amendment gives the national legislature "authority to pass laws which are appropriate to the attainment of the great object of the amendment"; and "Congress [has] the responsibility of seeing to it, for the future, that all the sections of the amendment are carried out in good faith." Cong. Globe, 39th Cong., 1st Sess. 2766, 2768 (1866) (statements of Sen. Howard).

C. The Drafting History of the Fourteenth Amendment Confirms That the Enforcement Power Was Understood To Be Broad and Central to the Amendment's Goals

Before Congress considered the wording it ultimately adopted as the Fourteenth Amendment, the House debated an initial draft. Nothing in the drafting history of the Fourteenth Amendment implies a narrow construction of congressional power to enforce its guarantees.

To the contrary, congressional power was so central to the Fourteenth Amendment's drafting history that the Joint Committee on Reconstruction's initial draft was solely a grant of congressional authority. On February 26, 1866, Bingham proposed this text:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and

> immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Introducing the initial draft, Bingham stressed the importance of giving Congress the power to act to protect constitutional rights against state infringement, in similar terms to those he used later to defend the new proposal: "Sir, it has been the want of the Republic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to these requirements of the Constitution." *Id.* For Bingham, congressional enforcement power was so significant that an earlier grant of authority might have averted the national catastrophe of the Civil War: "Nothing can be plainer to thoughtful men than that if the grant of power had been originally conferred upon the Congress of the nation, and legislation had been upon your statute-books to enforce these requirements of the Constitution in every State, that rebellion, which has scarred and blasted the land, would have been an impossibility." *Id.*

By granting Congress the power to make all laws "necessary and proper" to secure constitutional rights, the initial draft was similar to the final version of Section 5 in that it would have incorporated a broad construction of powers under *McCulloch*. The wide discretion these words would have given to Congress did not go unnoticed. *See* Cong. Globe, 39th Cong., 1st Sess. 1065 (statement of Rep. Hale) ("It has been settled judicially . . . that the words 'necessary and proper,' which are found in this amendment, as well

as in the original Constitution, by no means imply indispensable necessity . . . [I]t has been expressly settled that it means simply 'needful,' 'requisite,' conducive to.").

The initial draft met with skepticism from both sides of the House on other grounds. Democrats, and some Republicans, expressed concern with the initial draft's language, not because it used the phrase "necessary and proper," but because it would have granted authority to "secure . . . to all persons in the several States equal protection in the rights of life, liberty, and property." On one reading of this text, the draft would have granted sweeping power to pass equal legislation upon *all* matters regarding life, liberty, and property in the States. *See* Cong. Globe, 39th Cong., 1st Sess. 1064 (1866) (statement of Rep. Hale) ("[I]t is a grant of power in general terms—a grant of the power to legislate for the protection of life, liberty, and property, simply qualified with the condition that it shall be equal legislation."); *see also id.* at 1082 (statement of Sen. Stewart) ("The only way this could be accomplished, would be for Congress to legislate fully upon all subjects affecting life, liberty, or property, and in this way secure uniformity and equal protection to all persons in the several states.").

Attempting to respond to this criticism, Representative Bingham rejected that interpretation of the initial draft, stating that it was "simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today." Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). Despite this explanation,

the initial draft's ambiguous wording appears to have contributed to its postponement and the final version of the Amendment attempted to eliminate the ambiguity that gave rise to these concerns.

Another reason that the initial draft was postponed, and eventually superseded, was that it *did not go far enough* to secure liberty and equality. The difficulty with a constitutional amendment limited to granting legislative power was that any enforcement legislation could be repealed by a bare majority in Congress. Representative Hotchkiss expressed this concern, provoking laughter by stating that Bingham was "not sufficiently radical in his views upon this subject." Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). "It should be a constitutional right that cannot be wrested from any class of citizens, or from citizens of any State by mere legislation. But this amendment proposes to leave it to the caprice of Congress; and your legislation upon the subject would depend on the political majority of Congress, and not upon two thirds of Congress and three fourths of States." *Id.*

Representative Hotchkiss agreed that Congress should have an enforcement power, and stated that he would vote with Bingham to enact laws enforcing constitutional rights. Cong. Globe, 39th Cong., 1st Sess. 1095 (1866). But the absence of self-executing protections against state infringement led Hotchkiss to suggest postponing consideration of the initial draft, so that a new draft could be formulated, securing constitutional rights against a future congressional majority that might be hostile to racial equality. *Id.* In view of these various objections, the House voted 110-37 to postpone consideration of the

initial draft. *Id.* Many of the Fourteenth Amendment's key supporters, including Representatives Bingham and Stevens, voted in favor of postponement. *Id.*

As ultimately adopted, the Fourteenth Amendment responded to the objections voiced by members of the House against the initial draft.[7] By spelling out separately the Due Process Clause and the Equal Protection Clauses, the new proposal avoided the interpretation that the Amendment would give Congress overly broad power to pass uniform legislation on all matters affecting life, liberty, and property within the States.[8] More fundamentally, Section 1 of the Amendment provided self-executing protections for constitutional rights, meeting the concern that a future Congress could repeal any legislation Congress passed under an enforcement-only amendment. *See, e.g.*, Cong. Globe,

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[7] The final version of the Amendment, of course, did more than respond to these objections, adding three entirely separate sections. *See* U.S. Const. amend. XIV, §§ 2-4. Section 2 established new rules for apportioning Representatives to the States; Section 3 prevented the election or appointment to any federal or State office of any person who had held any of certain offices and then engaged in insurrection, rebellion or treason; and Section 4 confirmed that neither the United States nor any State would pay damages for the loss of slaves or debts that had been incurred by the Confederacy.

[8] By spelling out due process and equal protection rights, Bingham attempted to specify the subjects over which Congress had enforcement power. These protections are, of course, nonetheless "phrased at a high level of generality, encompassing or incorporating a broad array of constitutional rights." Br. for the Federal Appellee, at 22.

39th Cong., 1st Sess. 2462 (1866) (statement of Rep. Garfield) (constitutionally guaranteed protections of civil liberties should be adopted to ensure that a future majority in Congress could not repeal the provisions of the Civil Rights Act).

Though it provided an extra layer of protection for constitutional rights that the initial draft lacked, the final version of the Fourteenth Amendment did not in any way detract from the importance of Congress's power to enforce the right to equal protection of the laws and other constitutional rights. The new proposal provided explicitly that Congress would have power to enforce the substantive provisions of the Amendment, using language that, as discussed above, was widely understood to incorporate a broad view of congressional power and a deferential approach to judicial scrutiny of congressional exercises of that power. *See* U.S. Const. amend. XIV, § 5. Those who spoke in favor of the new version of the Amendment continued to stress both the breadth of Section 5's enforcement power and its central importance to the Amendment. Indeed, the new version was modeled on the nearly-identical clause of the Thirteenth Amendment, which was understood by its Framers to give Congress power to secure freedom to the former slaves.

Review of the drafting history thus clarifies that the change from the initial draft's wording from "necessary and proper to secure" constitutional rights to "appropriate legislation" to "enforce" rights did not change Congress's power to remedy or deter constitutional violations—the "great want" in the Constitution that Bingham sought to remedy. *See* McConnell, *Institutions and Interpretation*, 111 Harv.

L. Rev. at 177-81. The Fourteenth Amendment gave Congress the authority to enact "appropriate" laws, a word that was synonymous with—and certainly no narrower than—the term "necessary and proper." *See* Caminker, *"Appropriate" Means-Ends Constraints*, 53 Stan. L. Rev. at 1161. As authoritatively interpreted by the *McCulloch* Court, the term "necessary and proper" was interchangeable with the term "appropriate." *See* 17 U.S. at 413-21. The debates on both drafts reflect this understanding. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 586 (1866) (statement of Rep. Donnelly) (using the phrase "appropriate legislation" when discussing the initial draft); *id.* at 2766 (statement of Sen. Howard) (using the phrase "necessary and proper" when discussing the new proposal).

Similarly, the terms "secure" (used in the initial draft) and "enforce" (used in the Thirteenth Amendment and in the Fourteenth Amendment's final form) were considered equivalent during the debates. Bingham stated that the initial draft granted Congress "the power to enforce the bill of rights," Cong. Globe, 39th Cong., 1st Sess. 1088 (1866); the final version was said by one Representative to provide for "securing an equality of rights to all citizens." *Id.* at 2502 (statement of Rep. Raymond).

The new text of Section 5 thus paralleled the Thirteenth Amendment's enforcement clause. As explained above, the Thirteenth Amendment's enforcement clause was plainly understood to invoke *McCulloch*'s understanding of broad congressional power to choose "appropriate" means. As this Court has explained, "[t]he substitution of the 'appropriate

legislation' formula was never thought to have the effect of diminishing the scope of this congressional power." *Katzenbach v. Morgan*, 384 U.S. 641, 650 n.9 (1966) (citing Cong. Globe, 42nd Cong., 1st Sess. App. 83 (1871)).

D. The Fourteenth Amendment's Ratification Debates Confirm That Congress Would Have Broad Power to Enforce the Fourteenth Amendment

The ratification debates provide further evidence of the contemporary understanding of Congress's broad power to enforce the Fourteenth Amendment's substantive guarantees. In the North, the enforcement clause was little discussed. In the South, however, the legislative power that Section 5 gave Congress became a focal point for opposition to ratification; Democrats objected strenuously to the broad power they understood that Congress would have if the Amendment were ratified.

In state after state, Southern opponents of the Fourteenth Amendment expressed the fear that the authority to pass "appropriate legislation" would give Congress what they considered to be an excessive degree of power to define the obligations of States with respect to their citizens. *See* James E. Bond, *No Easy Walk to Freedom: Reconstruction and the Ratification of the Fourteenth Amendment* 254-55 (1997). One Texas Senator summed up these concerns: "What is 'appropriate legislation?' The Constitution is silent; therefore, it is left for the Congress to determine." *Journal of the Senate of the State of Texas*, 11th Legis., 421-22 (1866). In the same vein, Governor Jenkins of Georgia worried that Congress would have too much power over the States:

"It will be contended that [members of Congress] are the proper judges of what constitutes appropriate legislation. If therefore, the amendment be adopted, and a fractional Congress . . . be empowered 'to enforce it by appropriate legislation,' what vestige of hope remains to the people of those States?" Bond, *supra*, at 238. In many southern States, the ratification debates included similar statements recognizing that the Amendment confers broad prophylactic power on Congress. *See id.* at 34 (Mississippi); *id.* at 56-57 (North Carolina); *id.* at 87 (Louisiana); *id.* at 104 (Alabama); *id.* at 126-27 (South Carolina); *id.* at 148-51 (Virginia); *id.* at 173-74 (Florida); *id.* at 192-93 (Arkansas).

E. Legislative Interpretations of Section 5 in the Reconstruction Era Confirm the Contemporary Understanding of Congress's Enforcement Power

After the Fourteenth Amendment was ratified, legislative statements from the Reconstruction era reinforced the Framers' understanding of the text of Section 5: that Congress had been given wide latitude to select appropriate measures to achieve the purpose of protecting constitutional rights. Legislators repeatedly emphasized this understanding of Congress's broad power to enforce the guarantees of the Fourteenth Amendment. "When I assert that Congress has an ample power over this question," emphasized Senator Sumner,

> I rely upon a well known text . . . *McCulloch vs. State of Maryland* . . . . [T]he Supreme Court will not undertake to sit in judgment on the means employed by Congress in carrying out a power which exists in the Constitution. . . . Here is the

> definition of citizenship and the right to equal protection of the laws, . . . both placed under the safeguard of the nation. Whatever will fortify these is within the power of Congress, by express grant.

Cong. Globe, 42nd Cong., 2nd Sess. 728 (1872). *See also* Cong. Rec., 43rd Cong., 1st Sess. 414 (1874) (statement of Rep. Lawrence) ("The power to secure equal civil rights by 'appropriate legislation' is an express power; and Congress, therefore, is the exclusive judge of the proper means to employ. This has been settled in *McCulloch vs. Maryland*."); Cong. Globe, 41st Cong., 2nd Sess. 3882 (1870) (statement of Rep. Davis) ("No broader language could be adopted than this with which to clothe Congress with power . . . . Congress is clothed with so much power as is necessary and proper to enforce the two amendments to the Constitution, and is to judge from the exigencies of the case what is necessary and what is proper."); Cong. Globe, 42nd Cong., 1st Sess. App. 83 (1871) (statement of Rep. Bingham) ("The power to enforce . . . is as full as any grant of power to Congress.").

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The Fourteenth Amendment conferred broad power and discretion on Congress to protect the Amendment's majestic guarantees through laws molded by legislative experience and judgment. The Fourteenth Amendment's text, purpose, and history inform the meaning of the Fifteenth Amendment's enforcement clause as well, and powerfully reinforce the conclusion that Congress acted comfortably within its power to select "appropriate" means to enforce the Fourteenth and Fifteenth Amendments

when it reauthorized Section 5 of the Voting Rights Act.

In the legislation at issue, Congress acted to protect against racial discrimination in voting—clearly a core purpose under the Fourteenth and Fifteenth Amendments. Acting within its wide discretion to select appropriate means, Congress permissibly determined that prophylactic measures were appropriate to protect against unconstitutional racial discrimination in the administration of voting. Pursuant to the original understanding of the Reconstruction enforcement provisions—that Congress would have broad power to determine what is appropriate to protect the rights to equality, freedom, and political participation enshrined in the Reconstruction Amendments—the Court should defer to the legislature's reasoned judgment.

CONCLUSION

The judgment of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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